No. 2034

United States
Circuit Court of Appeals
For the Ninth Circuit.

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District,

Plaintiff in Error,

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of GEORGE D. BLISS, Deceased,

Defendant in Error.

Brief of Plaintiff in Error on Rehearing.

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STATEMENT.

This case is one of five causes that were presented to this court upon writs of error for a review of the decision of the old Circuit Court, which decision presented the question of law as to whether or not the legacies involved in each of said causes were subject to taxation under the Spanish-American War Tax Act, because of the fact that in each case the property had been willed to trustees for certain uses. The decision in these cases was rendered by this court on the first day of April, 1912, and reported under the title of Muenter vs. The Union Trust Co., 195 Fed. 480.

At the time of the submission of these cases there was no question as to the value of the estates, the only question submitted being the question of whether or not as a matter of law, the estates were subject to tax.

The case of United States vs. The Fidelity Trust Co., 222 U. S. 158, laid down the principle that an estate given to a trustee to hold and pay the income therefrom over to a person during his natural life was a vested estate and was subject to the tax.

The question then arises as to whether or not in this particular case the estate is of such value as to be subject to the tax. In the trial of the case in the court below no issue whatever was raised as to the value of the estate.

The estate which was taxed in this matter passed to Harriet L. Herrmann by the will of George D. Bliss, deceased, in which he devised an undivided third of his estate to Jeremiah F. Sullivan in trust upon the following terms, namely:

> 1. To hold the same in trust for my daughter, Harriet L. Herrmann, so long as she continues to be the wife of George Herrmann.
> 2. To pay over to my said daughter annually the rents, issues, profits and income thereof after deducting the expenses of managing, controlling and operating the same.
>
> Said trust shall terminate whenever my said daughter ceases to be the wife of said George Herrmann. If my said daughter shall cease so to be the wife of said George Herrmann before her death, then and in that event the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike. The amount of the estate passing being $14,872.20.

ARGUMENT.

Under the decision of the United States vs. The Fidelity Trust Company, *supra,* there can be little doubt but that this is a vested estate within the

meaning of the Succession Tax Act of June 13, 1898, 30 Stats. at Large, 448, 464.

The question then arises as to what is the value of this estate and how it can be ascertained.

Under this provision of the will the estate which passes consists of a particular estate to Harriet L. Herrmann, with a contingent remainder to her children based upon the contingency that at the time of her death she shall be the wife of George Herrmann.

The value of this particular estate under the terms of the will is equal to at least a life interest.

Should she be divorced from George Herrmann, or should George Herrmann die in her lifetime, this fact would not in any way decrease or limit her enjoyment of the estate, but would only remove the restrictions upon her enjoyment of it. The fact that George Herrmann may outlive her, or that he may be divorced from her, or that he should die before she dies, cannot in any way decrease her interest in the property below that of a life interest, and the happening of either the contingency of a divorce from him or of his death before her death will only increase her use and enjoyment of her interest. Consequently the Government should be permitted to tax at least a life interest in this estate, which can be definitely ascertained.

Under the common law, and as I understand it, the rule has not been changed in California, where a particular estate and a remainder are vested in the same person, they merge and become one estate. If there is any additional estate besides a life estate which Harriet L. Herrmann has vested in her, that

also should be subject to a tax.

The value of this portion of the estate is a question of fact to be determined by the Court upon the hearing of evidence. The value of the children's contingent interest, namely, that their mother must die while still the wife of George Herrmann, is such a remote contingency that the Court should practically ignore the same, and should consider that for purposes of taxation Harriet L. Herrmann received the whole of the estate. At any rate, the only part of the estate which Harriet L. Herrmann does not receive is the value of this contingent remainder which may possibly vest in the children, and the burden of proving the value of this interest is upon the plaintiff seeking to recover the tax.

If the Court sees fit to reverse this matter and remand it to the lower Court for further proceedings, another question which will undoubtedly arise in the trial of the case will be as to whether or not plaintiff is entitled to recovery under sections 3226, 3227 and 3228 of the Revised Statutes, which read as follows:

> "Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had

therein: Provided, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: Provided, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: Provided, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

The tax was assessed upon the interest passing to Harriet L. Herrmann and not upon the interest

passing to her children. Her interest is not a contingent interest, but is a vested interest.

Counsel for the defendants in error will undoubtedly cite the Daly case, 26 Op. Atty. Genl. 194, to the effect that this case does not come within the provisions of said sections of the Revised Statutes by reason of section 3 of the Act of Congress of June 27, 1902 (32 Stat. 406). Section 3 is as follows:

> "Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act, approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

A careful reading of the opinion will show that section 3 applies only to the recovery of taxes paid upon contingent beneficial interests. Under the ruling of this Court and the Supreme Court in the United States vs. The Fidelity Trust Company this

is not a contingent beneficial interest, and therefore does not come within the Act of June 27, 1902; consequently the procedure for the recovery of money paid to the Collector of Internal Revenue by reason of excessive valuation of the estate is that outlined in the cited sections of the Revised Statutes. The Government contends that the plaintiff below should show, before he is entitled to recovery, that he has complied with said sections.

Hicks vs. James' Administratrix, 48 Federal, 542.

Neither the protest nor claim presented to the Commissioner shows that the question of excessive valuation was presented to the Commissioner for his decision.

The grounds of illegality of tax should be pointed out to the Commissioner, otherwise the procedure before him would be useless.

The statute intends that a claim should be considered on its merits by the Commissioner of Internal Revenue before suit is brought, and the grounds upon which an appeal is sought must be set forth in the claim, so that the Commissioner may properly pass upon the merits of the claim, otherwise a claimant might place fictitious reasons in his claim, have his claim rejected, and bring suit, thus getting into the courts without having in good faith followed the procedure laid down by the statutes.

Nowhere in the claim is any contention made of an excessive valuation of the estate, and until the Commissioner of Internal Revenue has been called upon to pass upon such a question, suit should not

be brought in the courts to recover the tax alleged to have been collected upon the excessive valuation.

Our contention therefore is that the Court should reverse the judgment of the Court below.

Respectfully submitted,

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